IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 1082 of 1994

WITH

SPECIAL CRIMINAL APPLICATION No 1164 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL

and

Hon'ble MR.JUSTICE R.K.ABICHANDANI

and

Hon'ble MR.JUSTICE M.R.CALLA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : YES

5. Whether it is to be circulated to the Civil Judge? : NO

SPL. CRIMINAL APPLICATION NO. 1082/1994

LATIF CHHMTUMIYA SHAIKH

Versus

STATE OF GUJARAT

SPL. CRIMINAL APPLICATION NO. 1164 OF 1994

SABIRHUSEIN R MALEK

Versus

DISTRICT COLLECTOR, VADODARA & ORS.

Appearance:
SCR.A.1082/94
MR SANJAY M DOSHI for Petitioner
SCR.A. NO.1164/94
MR MM TIRMIZI for petitioner
MR. D.N. PATEL, ADDL. PUBLIC PROSECUTOR for State

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE M.R.CALLA

Date of decision: 21/07/2000

C.A.V. JUDGEMENT (Per B.C. Patel, J., and per R.K. Abichandani, J. & M.R. Calla, J., both concurring)

PER B.C. PATEL, J.

1. The Hon'ble the Chief Justice Mr. B.N.Kirpal, (as he then was) of this Court sitting with Mr. R.K. Abichandani, J., on 18th August 1994, considering the rival submissions, referred four questions to the Larger Bench which are as under :-

[1] Whether the High Court can grant bail, parole or furlough to an accused convicted of an offence under Narcotics Drugs & Psychotropic Substances Act, during pendency of an appeal against the conviction and sentence or thereafter ?

[2] Whether High Court in exercise of its writ jurisdiction under Article 226 and 227 of the Constitution of India, can suspend the sentence by granting parole, furlough or bail to an accused convicted of an offence under TADA?

[3] Whether the High Court can exercise its writ jurisdiction and suspend the sentence of an accused convicted under TADA and whether such exercise should be undertaken in view of the observations made by the Supreme Court in the case of Kartarsingh, reported in 1994[2] J.T. p.423 and in the case of Usman Daud reported in AIR 1988 SC p. 922?

[4] Can High Court direct release on parole a convict undergoing sentence imposed by the competent

court when an appeal arising out of said judgement of conviction and sentence is pending?

2. The applicant of Special Criminal Application No.1164/94 who was convicted by a competent court u/s 3[3] and 5 of the Terrorists & Disruptive Activities Act, [hereinafter referred as `TADA Act'] preferred an application for parole for a period of 10 days on a humanitarian ground, namely the marriage of his son. It is averred in the petition that on 5/8/94, applications were forwarded to the respondents but respondents have not replied to the petitioner. It is further averred that at last moment if application is rejected, it would not be possible to approach the Court thereafter for obtaining relief as by the time the Additional Public Prosecutor obtains instructions, the petition would become infructuous.

3. The petitioner has no where mentioned in the application that the applicant has preferred an appeal against the order of conviction or not, and if preferred, what is the stage of the appeal. This aspect being a very relevant aspect, the petitioner ought to have mentioned about it. The petitioner has mentioned in para [7] of the petition about the fact of not filing an application or appeal before any Court in the subject matter - meaning thereby in the matter of parole.

4. The applicant of Special Criminal Application No.1082/94 who was convicted for offences punishable under the Narcotics Drugs & Psychotropic Substances Act [hereinafter referred to as `the NDPS Act'], has preferred this application for parole on humanitarian ground, namely to perform the ceremony which is observed by the Muslims after the death of a deceased. The applicant has stated in his application that on 11/7/94, he preferred an application, however, Collector orally informed that the applicant will have to move I.G. Prison and hence, on 17/4/94, an application was forwarded to I.G.P. but there was no reply from I.G.P. As there was no reply, the applicant moved this Court inter alia stating that his father expired on 9/7/1994 and for performing the after death ceremony, he should be released on parole. It is also relevant to note that the petitioner has no where stated in the application whether he has preferred an appeal against the order of conviction and sentence recorded against him for offences punishable under the NDPS Act or not?

5. The Division Bench in Special Criminal Application No.1082/94 referred the matter to a Larger Bench and for

that purpose, directed the office to place the matter before the Hon'ble the Chief Justice for passing appropriate orders. The said Special Criminal Application was placed before the Bench. In view of the observations made by the Division Bench of this Court on 8th May 1991 in Criminal Misc. Application No.971/90 [Coram : N.B.Patel & V.H.Bhairavia, JJ.], the court hearing the application referred the matter to the Larger Bench.

Question No.1 :

Re: Suspension of sentence of a convict undergoing sentence punishable under N.D.P.S. Act.

6. So far as the accused undergoing sentence for breach of provisions contained in the NDPS Act is concerned, the question was raised before the Division Bench, whether a convict can be released either on parole or furlough by the concerned authority under Parole & Furlough Rules after addition of section 32-A in the NDPS Act. The said section reads as under :-

32-A :: No suspension, remission or commutation in any sentence awarded under this Act :-

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 [2 of 1974] or any other law for the time being in force but subject to the provisions of section 33, no sentence awarded under this Act [other than section 27] shall be suspended or remitted or commuted."

7. The Division Bench in case of Ishwarsinh Rajput v/s State of Gujarat reported in 1990[2] GLR 1365 to which one of us (B.C. Patel, J.) was a party, considered the statement, objects and reasons of the N.D.P.S. Act, as also the provisions contained in Article 14 and 21 of the Constitution of India. The Court's attention was also drawn to the human rights proclamation made by General Assembly of United Nations and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedom stated in universal declaration. The Court also considered that section 433-A of the Criminal Procedure Code, 1973 [hereinafter referred as `the Code'], which directs that the sentence in case covered by section 433-A shall not be less than 14 years. Sentencing is a judicial function, but the execution of sentence after the pronouncement of a judgement is

ordinarily a matter for the executive wing under the Prisons Act or under the Code or other statute. Considering various aspects, the Division Bench held that the convicts under the NDPS Act are not entitled to be released on parole or furlough and dismissed the petition.

8. So far as the question No.1 which pertains to release of a convict on parole or furlough, who is undergoing the sentence for offences punishable under the NDPS Act during pendency of the appeal against the conviction and sentence or thereafter is concerned, in view of language of section 32-A of the NDPS Act, the convict cannot be released on parole or furlough. The mandate of the legislature is that no sentence awarded under the NDPS Act shall be suspended, remitted or commuted and therefore, there is no question of releasing the convict on parole or furlough which would amount to suspension of sentence temporarily.

9. So far as the question with regard to grant of bail to an accused convicted of an offence under the NDPS Act, during the pendency of the appeal against the conviction and sentence is concerned, the Division Bench [Coram : N.B.Patel & V.H.Bhairavia, JJ.] in Misc. Criminal Application No.971/90 etc. on 8th May 1991, considered the applicability of section 32-A of the NDPS Act. The Court expressed the opinion that "the power conferred by section 389 of the Criminal Procedure Code is only to suspend the execution of the sentence and not to suspend the sentence itself". The Court expressed an opinion that, "it would not be correct to say that the special power conferred by section 389 of the Criminal Procedure Code is done away by the provision of section 32-A of the NDPS Act. We are therefore clearly of the opinion that the only power which is taken away by section 32-A of the NDPS Act is the executive power of the appropriate Government to grant suspension, remission or commutation of sentence referred to in Chapter 32 of the Criminal Procedure Code", and the Court rejected the contention raised by the public prosecutor that the powers u/s 389 of the Cr.P.C. are also affected or destroyed by section 32-A of the NDPS Act. The Court on merits however allowed the applications for bail in some cases and passed an order releasing the convict on bail and rejected the application in some cases.

10. In case of Maktool Singh v/s State of Punjab, reported in [1999] 3 SCC 321, the Apex Court held that section 32-A of the NDPS Act has taken away the powers of the Court to suspend the sentence passed on persons

convicted under the Narcotic Drugs and Psychotropic Substances Act, 1985 [except the section 27] and sentence could not be suspended during the pendency of the appeal of such a convict.

11. In view of this decision, the question No.1 must be answered in negative, by stating that the High Court has no power to suspend the sentence by grant of bail, parole or furlough to an accused convicted of an offence under the NDPS Act during pendency of the appeal against conviction and sentence or thereafter.

Question No.2 & 3 ::

Can High Court suspend the sentence of a convict undergoing sentence under TADA Act by issuance of writ under Article 226 and 227 or can release the convict in view of the Supreme Court judgement?

12. So far as the question No.2 with regard to exercise of writ jurisdiction under Articles 226 and 227 for suspending the sentence by granting parole, furlough or bail to a convict of an offence under the TADA Act is concerned, as the High Court has no jurisdiction to hear the appeal under the provisions of the TADA Act, ordinarily the High Court should not exercise its writ jurisdiction under Articles 226 and 227 of the Constitution of India to suspend the sentence of a convict under TADA Act. It is also required to be noted that the appeal of a convict under TADA Act against the order of conviction and sentence is to be lodged before the Apex Court and therefore, powers under section 389[1] of the Criminal Procedure Code cannot be exercised by the High Court. Therefore, during the pendency of the appeal preferred by convict before the Apex Court, the High Court will have no jurisdiction to entertain the application for suspension of sentence.

13. Constitution of India is not a statute. Besides the prerogative Writs, Article 226 of the Constitution also speaks of directions and orders which can be issued to any person or authority including in appropriate cases to any Government.

14. The power vested with the High Courts to exercise judicial superintendence over the decision of all Courts and Tribunals within the respective jurisdiction is also a part of the basic structure of the Constitution. The distinction between the Act, enacted by the legislature and the Constitution of India is required to be borne in mind. Powers conferred on High Courts under Article 226

cannot be taken away or curtailed by any legislation. The subordinate judiciary or Tribunal created under ordinary legislation cannot exercise the power of judicial review of the legislative action to the exclusion of the High Courts and the Supreme Court. So far as the basic structure of the Constitution of India is concerned, the Apex Court in case of L. Chandrakumar v/s Union of India reported in AIR 1997 SC 1125 pointed out that the constitutional safeguards which ensure the independence of the Judges of the superior judiciary are not available to the Judges of the subordinate courts or to those who man Tribunals created by ordinary legislations. Consequently, the Judges of the latter category can never be considered as full and effective substitutes for the superior judiciary in discharging the functions of the constitutional interpretation. Therefore, the power of judicial review over legislative action vested in the High Court under Article 226 and in Supreme Court under Article 32 is an essential feature of the Constitution of India constituting part of its basic structure. Ordinarily therefore, the power of the High Courts and the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded.

15. When in respect of a convict under TADA Act, the authority exercising powers under the provisions contained in the Bombay [Furlough and Parole] Rules, 1959, refuses to exercise the powers vested in it or exercise the powers on a ground which is not germane or is deciding the application of parole or furlough on the ground which is non est, the High Court can interfere. It is required to be borne in mind that the High Court in exercise of its jurisdiction under Article 226 and 227 of the Constitution of India, is not sitting in appeal over the decision of the competent court or authority. Therefore, when the decision is perverse or is such which no reasonable person could have arrived at, only then the High Court may intervene.

16. In case of Ayubkhan Kalandarkhan Pathan v/s State of Gujarat, reported in 1990[1] GLR VOL. XXXI[1] 473, [Coram : S.B.Majmudar & B.S.Kapadia, JJ], this Court considered the 42nd amendment to the Constitution of India which introduced Part XIV-A relating to Tribunals. Before the High Court, the case was pertaining to the provisions contained in the TADA Act. There is no specific provision which takes away the constitutional rights of the person and there is also no provision under the TADA Act to take away the powers of the High Court to decide the matter under Article 226 of the Constitution of India. The Division Bench held that, in absence of

any provision in the Constitution of India taking away the power of the High Court under Article 226 of the Constitution for entertaining any such petition when there is real fear of infringement of fundamental rights, it cannot be taken away by the Act of Parliament and in fact no such provision is made in the TADA Act. Before the Division Bench, the Court's jurisdiction was invoked under Article 226 of the Constitution of India for a writ of mandamus directing to quash the First Information Report, and seeking certain directions in connection with the offence registered under the TADA Act and for interim relief restraining the respondents No.1 and 2 [police officers] from arresting him. The Court pointed out that if the Court is moved for challenging unauthorised detention order before actual detention, on the ground that the order is nullity because it is passed [a] by an incompetent person or [b] it is a mala fide order or [c] it is contrary to the legal procedure prescribed for passing such an order, or [d] it is otherwise a nullity for any other reason, for example, passed against a wrong person, it cannot be said that such challenge would be per se not maintainable.

17. The Supreme Court in case of Usmanbhai Dawoodbhai Memon v/s State of Gujarat reported in AIR 1988 SC 922 observed as under :-

> "12. At the very outset, Shri Poti, learned counsel appearing for the State Government with his usual fairness, unequivocally accepted that the provisions of the Act do not take away the constitutional remedies available to a citizen to approach the High Court under Article 226 or Article 227 or move this Court by a petition under Article 32 for the grant of an appropriate writ, direction or order. It must necessarily follow that a citizen can always move the High Court under Article 226 or Article 227 or this Court under Article 32 challenging the constitutional validity of the Act or its provisions on the ground that they offend Articles 14, 21 and 22 or on the ground that a notification issued by the Central Government or the State Government u/s 9[1] of the Act constituting a Designated Court for any area or areas or for such case or class or group of cases as specified in the notification was a fraud on powers and thus constitutionally invalid."

18. The writ jurisdiction under Article 226 exists as a separate and independent basis of jurisdiction apart

from the statutes. It stands upon the fountain source of law and the basis for its exercise may be put at different pedestal even on wider footing to prevent injustice. This jurisdiction is exercised on source of powers. However, the Court cannot ignore a substantive rights of a litigant. The Court has to exercise the jurisdiction keeping in mind various principles laid down by the Apex Court as well as High Courts. Surely, the High Court has no jurisdiction while exercising powers under Article 226 and 227 of the Constitution of India, alike the jurisdiction of the Apex Court under Article 142 of the Constitution of India. The Apex Court has also pointed out with regard to the powers to be exercised under Article 142 of the Constitution of India is with a view to do justice between the parties. The Court cannot lose sight of the relevant statutory provisions. The Court also pointed out that the Court would be bound by the relevant provisions of the procedure. The High Court while exercising the powers under Article 226 of the Constitution of India, will not pass an order inconsistent with the provisions of law. However, the Court can declare the provisions as ultra vires, but so long as the provision is not declared ultra vires, the Court will have to decide the matter in accordance with the statutory provision.

19. It is required to be noted that so far as an ouster of jurisdiction of the ordinary court is concerned, the Apex Court in case of Usmanbhai Daudbhai and others v/s State, reported in 1988[2] GLR 859, after considering the provisions contained in section 439 of Criminal Procedure Code and in section 20 of the Terrorist & Disruptive Activities [Prevention] Act, 1987 and considering the views expressed by the Apex court in case of Balchand Jain v/s State reported in 1977 [2] SCR 52 [AIR 1977 SC 366], upheld the views expressed by the Division Bench of this Court that the High Court had no jurisdiction to entertain an application for bail u/s 439 or u/s 482 of the Code. The Court pointed out that the Apex Court in case of Balchand Jain [supra] proceeded on the well recognized principle that an ouster of jurisdiction of the ordinary court is not to be readily inferred except by express provisions or by necessary implications. It all depends on the scheme of a particular Act as to whether the power of the High Court and the Court of Sessions to grant bail u/s 438 and 439 of the Code exists. Therefore, the High Court will not be in a position to entertain the application for bail, meaning thereby the High Court cannot suspend the sentence of a convict under the TADA Act.

20. Before the High court, the jurisdiction of the Court was invoked with the aid of section 439 read with section 482 of the Code. If the legislature has intended to exclude the jurisdiction of the High Court in so far as the bail is concerned for the offences punishable under the TADA Act, can by another mode the jurisdiction of the Court be invoked? And if yes, what would be the limitation in exercise of the powers ?

21. After completion of the trial as per the procedure laid down under the provisions, if the accused is convicted under the TADA Act, so far as the bail pending hearing of an appeal is concerned, the High Court has no power to entertain the application in view of the pronouncement by the Apex Court. It is also required to be noted that, on appreciation of evidence, the Court has convicted the accused and how to manage and regulate the jail administration is essentially and entirely, the concern and the look out of the jail authorities and as long as the orders passed by them are just, fair and proper, the court has no right to interfere with such orders passed by the authority concerned and to insert its own reason for releasing the convict on parole.

22. The Division Bench in case of Ishwarsinh Rajput [supra] considered the provisions contained in Prisons Act, 1894 and the provisions contained in Bombay Jail Manual and held that the convicts under the provisions of the N.D.P.S. Act are class by themselves. The convicts under TADA Act are a separate class by themselves. The Court has held in case of Ishwarsinh Rajput [supra] that the classification of prisoners convicted under the NDPS Act and those convicted under other law is a reasonable, rational and on the same principle, the classification would be justified. They are not the convicts to be treated at par with the convicts undergoing sentence under penal code or undergoing sentence for committing offences under the other Acts. The convicts undergoing sentence under the TADA Act are the prisoners convicted of gravest offence. They should not be permitted to move freely in the society.

23. In view of the terrorism created by the offenders which raise the special criminal problems compelled the legislature to create special courts. In view of the special problems for which they can be said to be responsible, a special procedure for trial has been prescribed. Disruptive activities are defined in section 3 and 4 of the TADA Act. The offenders for whom the special courts were required to be created and a separate procedure was required to be prescribed, are not held

entitled to invoke the jurisdiction of the High Court u/s 439 read with section 482 of the Criminal Procedure Code. Therefore, merely an application for furlough / parole is rejected, would not be a ground to entertain the application. Under the set up created under the Prisons Act, 1894 and Prisoners [Bombay Furlough and Parole] Rules, 1959, in absence of violation of the constitutional right, question of entertaining the application does not arise.

24. Before us, it was submitted that the decision in case of Usmanbhai Daudbhai [supra] refers to section 439 and section 482 of the Criminal Procedure Code. No where it has laid down that powers under Article 226 / 227 of the Constitution of India cannot be exercised by the Court.

25. The Apex Court in case of Kartar Singh v/s State of Punjab reported in 1994 [2] JT 423 pointed out as under :-

> "388. Though the High Courts have very wide powers under Article 226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles. The legislative history and the object of TADA Act indicate that the special Act has been enacted to meet challenges arising out of terrorism and disruption. Special provisions are enacted in the Act with regard to the grant of bail and appeals arising from any judgment, sentence or order (not being an interlocutory order) of a Designated Court etc. The overriding effect of the provisions of the Act (i.e. Section 25 of TADA Act) and the Rules made thereunder and the non-obstante clause in Section 20(7) reading, "Notwithstanding anything contained in the Code..... clearly postulate that in granting of bail, the special provisions alone should be made applicable. If any party is aggrieved by the order, the only remedy under the Act is to approach the Supreme Court by way of an appeal. If the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of the Parliament would be completely defeated and frustrated. But at the same time it cannot be said that the High Courts have no jurisdiction. Therefore, we totally

agree with the view taken by this Court in Abdul Hamid Haji Mohammed' that if the High Court is inclined to entertain any application under Article 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. What those rare cases are and what would be the circumstances that would justify the entertaining of applications under Article 226 cannot be put in straitjacket. However, we would like to emphasise and reemphasise that the judicial discipline and comity of courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicted under the special Act since this Court has jurisdiction to interfere and correct the orders of the High Courts under Article 136 of the Constitution. "

26. Again in sub-para [16] of para 398 while summing up, the Apex Court pointed out as under :-

[16] Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the Act, 1987, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of courts require that the High Courts should refrain from exercising the extra ordinary jurisdiction in such matter."

27. Thus, the party has remedy to approach the Apex Court. If the High Courts entertain applications for parole i.e. suspension of sentence or the bail applications invoking their extra ordinary jurisdiction under Article 226 of the Constitution and pass the orders, then the very scheme and the object of the Act would be completely defeated and frustrated but at the same time it cannot be said that High Court, under Article 226/227 is totally devoid of jurisdiction to consider such applications in appropriate cases.

28. In view of what is stated hereinabove, the High Court in exercise of its writ jurisdiction under Article 226 and 227 of the Constitution of India ordinarily cannot suspend the sentence by granting parole, furlough or bail to an accused convicted of an offence under the TADA Act.

Answered accordingly.

Question No.4 ::

Can High Court direct release of convict on parole undergoing sentence, whose appeal is pending before the Court?

29. The Parole can be granted to a convict under Rule 19 of the Prisons [Bombay Furlough and Parole] Rules, 1959, which reads as under :-

"19. A prisoner may be released on parole for such period as the Competent Authority referred to in Rule 18 in its discretion may order, in case of serious illness or death of any member of the prisoner's family or of his nearest relative or any other sufficient cause."

30. This power undoubtedly can be exercised in accordance with the Rules and the provisions of relevant enactment. However, the competent authority cannot exercise the power with regard to the convict whose appeal is pending before the Court for hearing.

31. When the court is hearing the appeal, the Court may be required to consider the application submitted for bail, grounds raised in the application, evidence adduced by the prosecution against the convict, and the reply filed by the State against the application for bail. So far as Authority considering the application under Bombay [Furlough & Parole] Rules 1959 is concerned, it stands on a different footing. The authority exercising the powers is not required to consider the evidence on record, but on satisfying itself by recording statements of some persons residing in the vicinity to the effect that the convict is not likely to cause any harm, the authority has to exercise the discretion of releasing the convict on parole. The authority has to exercise the discretion considering the period for which the convict is required to undergo the sentence, nature of the offence and such other aspects as required to be considered under the Rules while releasing the convict on parole. So far as the powers to pass certain orders in case of a convict is concerned, whose appeal is pending for hearing, the decision in case of K.M.Nanavati v/s State of Bombay reported in AIR 1961 SC 112, is required to be considered. The Apex Court after observing that there was no conflict between the powers conferred on the

judiciary and the Governor under Article 161 of the Constitution, held that so long as the judiciary had the powers to pass particular order in a pending case, to that extent, the power of executive will have to be held limited in view of the words either of section 401 [now section 432 of the 1973 Code] and section 426 [now section 389 of 1973 Code]. The Apex Court further held as under :-

> "They can be harmonised without any difficulty, if section 426 is held to deal with a special case restricted to the period while the appeal is pending before an Appellate Court while section 401 deals with the remainder of the period after conviction. We see no difficulty in adopting this interpretation nor is there any diminution of powers conferred on the executive by section 401 by this interpretation. The words "at any time" emphasise that the power under section 401 can be exercised without limit of time, but they do not necessarily lead to the inference that this power can also be exercised while the court is seized of the same matter under section 426."

32. Thus, powers under the provisions contained in the Bombay [Furlough and Parole] Rules, 1959 cannot be exercised by the executive in favour of a convict undergoing sentence whose appeal is pending before the Court. The Division Bench in case of State of Gujarat v/s Jayantilal M. Patel [1995 - 2 - G.L.H. 260] examined the Scheme of the Bombay [Furlough and Parole] Rules, 1959, and section 389[1] of Criminal Procedure Code. The Division Bench following the decision of the Apex Court in case of K.M.Nanavati [supra] and agreeing with the views of Division Bench of Bombay High Court in case of Jayant Veerappa Shetty v/s State of Maharashtra [1985 Cr.L.R. Maharashtra page 598] held that the power of grant of parole cannot be exercised by the administration where the appeals of convicts concerned are pending and such persons can be released on bail only by the Appellate Court under section 389[1] of the Code of Criminal Procedure and not by the administration. The power of the administration will be exercisable only during the remainder of the period after conviction as held by the Supreme Court in K.M.Nanavati's case [supra]. In our opinion, the Court can order the suspension of execution of sentence or order appealed and can release the convict on bail u/s 389[1] of the Criminal Procedure Code, 1973. This is the only provision empowering the Court to release the convict on bail.

33. In our opinion, a convict undergoing sentence imposed by the competent court cannot be released on parole or furlough by High Court when an appeal arising out of the said judgement of conviction and sentence is pending.

34. In Special Criminal Application No.1082/94, while referring the legal issue to the larger Bench the Division Bench permitted the petitioner to attend the post-death ceremony under strict police escort. Hence this petition stands disposed of.

In Special Criminal Application No. 1164/94 learned advocate Mr. M.M. Tirmizi has filed a note dated 22.3.2000 that the same has become infructuous. Hence this petition stands disposed of accordingly.

(B.C. PATEL, J.)

PER R.K. ABICHANDANI, J.

35. I respectfully agree with the conclusions reached by my Lord Hon'ble Mr. Justice B.C. Patel, in His Lordship's elaborate judgment.

36. The questions relating to matters other than those which are specifically barred by the statute can be examined under Article 226 of the Constitution. Even the validity of the impugned statutory provisions can be gone into under Article 226. But once the validity is upheld or if it is not in issue, the statutory bar must prevail. There is nothing in Article 226 which empowers the High Court to nullify the effect of a valid statutory provision and direct the course of action that is specifically prevented by the legislature in its wisdom. Such an exercise of power will be illegal and arbitrary. The grace of power is enhanced, if its exercise is confined to its own limits and a valid legislative provision cannot be overreached by considerations not warranted for such exercise. The reliefs are to be moulded to protect the rights that are jeopardised, but when a statute has specifically taken away a right, it cannot be generated from the Court's power of granting reliefs. Therefore, what Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 specifically prohibits, namely - suspension, remission or commutation of sentence awarded under the Act, notwithstanding anything contained in the Code of Criminal Procedure, cannot be granted under Article 226, for, it cannot be said that such prohibition operates only when an application is made under the Code by the convict

invoking such power and not when he makes a petition under Article 226 of the Constitution to the High Court. The power is simply taken away. When the High Court in a conviction appeal cannot suspend or remit or commute the sentence, in view of the provisions of Section 32A of the said Act, a fortiori, it cannot do so under Article 226, so long the provision is treated as constitutionally valid. The provision would otherwise become redundant, because, it would simply succumb to a procedural gimmick. The Hon'ble Supreme Court, in context of its plenary power under Article 142 of the Constitution, in Supreme Court Bar Association vs. Union of India, reported in 1998 (4) SCC 409 at page 432 has, in paragraphs 47 and 48 of the judgment, set a classic example of upholding the majesty of law, which should provide a sufficient guide to contain the power under Article 226 of the Constitution within the bounds of valid laws. When substantive statutory provision dealing with the subject matter of a given case cannot be ignored by the Supreme Court while making an order under Article 142, which as held by the Supreme Court, is not meant to be exercised so as to come directly in conflict with what has been expressly provided in a statute dealing with the subject, can it be said that power under Article 226 of the Constitution of India, which undisputedly is of a wide amplitude and may be invoked for testing the validity of a provision of law itself, can be invoked to suspend, commute or remit the sentence awarded under the Act, which cannot be done by the High Court in exercise of its powers under the Code of Criminal Procedure as the appellate forum? It will be inappropriate for the High Court to allow its power under Article 226 to be invoked as a wayout for the convict whose sentence cannot otherwise be suspended or remitted or commuted under the said Act.

(R.K. ABICHANDANI, J.)

PER M.R. CALLA, J.

37. With respect I agree with the conclusions reached by my Lord Hon'ble Mr.Justice B.C.Patel in his detailed judgment after due consideration of the relevant judicial pronouncements; I also agree with the views in courteous agreement thereof expressed by my Lord Hon'ble Mr.Justice R.K.Abichandani and with the advantage of reading the views of my both the learned and noble brothers, I feel inspired to add as under with regard to questions nos.2 and 3 under reference:

38. Once these two questions are answered as per para

28 of this judgment (Hon'ble B.C.Patel, J.) that the High Court in exercise of its writ jurisdiction under Articles 226 and 227 of the Constitution of India ordinarily cannot suspend the sentence by granting parole, furlough or bail to an accused convicted of an offence under the TADA Act, it requires little elaboration as to possibly what could be those exceptional or extraordinary cases warranting exercise of this power by the High Court in such matters. While referring these questions, a specific reference was made to the case of Usmanbhai Dawoodbhai, reported in AIR 1988 SC 922 and Kartar Singh reported in 1994(2) JT 423 by my Lord Hon'ble B.N.Kirpal, Chief Justice of this Court as he then was and Hon'ble R.K.Abichandani, J. So far as the decision in Usmanbhai Dawoodbhai's case (supra) is concerned, the contents of para 12 of the judgment as have been quoted in para 17 of this judgment (Hon'ble B.C.Patel, J.) show that the Apex Court had noted the statement which was made by Shri Poti and further that the statement as had been made must necessarily follow that a citizen can always move the High Court under Article 226 or 227 or the Supreme Court under Article 32 challenging the constitutional validity of the Act or its provisions on the ground that they offend against Articles 14, 21 and 22 or on the ground that a notification issued by the Central Government or the State Government under Section 9(1) of the Act constituting a Designated Court for any area or areas or for such case or class or group of cases as specified in the notification was a fraud on powers and thus constitutionally invalid, covers only the cases as mentioned above. However, it does not include the cases with regard to suspension of sentence for granting parole, furlough or bail to an accused convicted of an offence under TADA. In the other decision of the Supreme Court in Kartar Singh's case, i.e. reported in 1994 (2) JT 423 in para 388 (Hon'ble S.Ratnavel Pandian majority opinion) which has been quoted in para 25 of this judgment (Hon'ble B.C.Patel, J.), the Supreme Court has observed that if the High Courts entertain bail applications invoking their extraordinary jurisdiction under Article 226 and pass orders, then the very scheme and object of the Act and the intendment of the Parliament would be completely defeated and frustrated, but at the same time, it cannot be said that the High Courts have no jurisdiction. It has been further observed with emphasis that the judicial discipline and Comity of the Courts require that the High Courts should refrain from exercising their jurisdiction in entertaining bail applications in respect of an accused indicted under the Special Act since the Supreme Court has jurisdiction to interfere and correct the orders of

the High Court under Article 136 of the Constitution. In sub-para 16 of para 398 (Hon'ble S.Ratnavel Pandian majority opinion) of the Supreme Court judgment which has been quoted in para 26 of this judgment (Hon'ble B.C.Patel, J.), the Supreme Court while observing that it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way relating to the cases under the Act of 1987 has said that, that power should be exercised sparingly and that too only in rare and appropriate cases in extreme circumstances and at the same time it has also been added that, "But the judicial discipline and comity of Courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters." Therefore, the proposition admits of no controversy that so far as the writ jurisdiction of the High Courts under Article 226 and 227 of the Constitution to entertain such applications is concerned, the jurisdiction is there, it is not a closed domain altogether but the caution has been given with regard to exercise of the power and that it should be exercised sparingly and on the principle of judicial discipline and comity of the Courts, the High Court should refrain from exercising the extraordinary jurisdiction in such matters. In this decision of Kartar Singh (supra) the earlier decision in the case of Usmanbhai Dawoodbhai (supra) was also considered in para 161, 162 and para 372 thereof. It is, therefore, clear that the High Court has the jurisdiction to entertain such applications and suspend the sentence of accused convicted under TADA Act, but the question which has been referred is as to whether such exercise should be undertaken by the High Court under Article 226 in view of the observations made in the Supreme Court decision in Kartar Singh's case (supra) and Usmanbhai Dawoodbhai's case (supra). In my opinion, once the jurisdiction under Article 226 is there with the High Court to entertain such applications, the exercise of such jurisdiction may be undertaken by the High Court in appropriate cases only keeping in view the words of caution given by the Supreme Court in Kartar Singh's case (supra). Accordingly, there is no question of exercising this jurisdiction in normal course. The question, therefore, arises as to what are the limits for exercise of such jurisdiction? No doubt, such limits cannot be defined but it can certainly be said that,

'to reach injustice wherever it is and which can't be put to an end in normal course'

should be the limit for exercise of such power. In the

case of Dwarka Nath v. I.T. Officer, reported in AIR 1966 SC 81 in para 4, the Supreme Court with reference to scope of Art.226 had observed as under:

> "This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found."

39. Justice is one who has the strength to put an end to injustice. Justice is a virtue which transcends all barriers. When the Court is required to do justice between the parties or to render substantial justice, the procedural requirements or the technicalities of law or other rigours cannot be allowed to stand in its way and even the law has to bend before justice. I am fortified in expressing this view by the observations made by the Hon'ble Supreme Court in the case of S.Nagaraj v. State of Karnataka reported in 1993 Supp (4) SCC 595 at page 618 in para 18 thereof as under:

> "Justice is a virtue which transcends all barriers. Neither the rules of procedure nor technicalities of law can stand in its way. The order of the Court should not be prejudicial to anyone. Rule of stare decisis is adhered for consistency but it is not as inflexible in Administrative Law as in Public Law. Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness."
> [emphasis supplied]

In this very judgment in the end of para 36, the Supreme Court has quoted Cicero, saying that,

> "there is none more important than clearly to understand that we are born for justice and that right is founded not in opinion but in nature."

The Supreme Court has further observed that this very idea was echoed by James Madison (The Federalist, No.51, page 352) as under:

> "Justice is the end of government. It is the end of the civil society. It ever has been and ever will be pursued, until it be obtained or until liberty be lost in the pursuit."

40. The principle is, therefore, clearly discernible that the concept of writ jurisdiction is founded on

equity and fairness. The arm of the High Court under Article 226 and 227 of the Constitution of India is long enough to reach injustice wherever it is found. We are born for justice and justice is the supreme purpose for which we exist. In this view of the matter, in a given case if the High Court finds under Article 226 and 227 of the Constitution of India:

(i) that the applicant will be subjected to an irremediable injustice,

(ii) that there is a blatant violation of human dignity and human rights,

(iii) that the relief is required to be given to protect the rights that are jeopardised, keeping in view that any person even if condemned or convicted does not cease to be a human being,

(iv) that an immediate direction is required to be given so as to save the applicant's life which may be in peril at the hands of other convicts in jail,

(v) that appropriate order is required to be passed for the very existence of the applicant,

(vi) that the applicant is facing threat to his life on account of fatal disease for which treatment can't be made available to him in jail,

(vii) that any other ground of the same nature as (i) to (vi) exist, because the grounds (i) to (vi) are only illustrative and not exhaustive.

Such exercise may be undertaken for passing appropriate orders in such matters and to that extent the rigours are required to be relaxed.

41. In my considered opinion, in doing so, there is no question of violating any statutory provision because after all, the statutory bar is a bar under the provisions of the Act enacted by the Legislature and it is the trite law that such bar cannot come in the way of exercise of the powers under the Constitution as have been conferred on the High Courts to reach the likely injustice and for that purpose to certain extent, the

bar, if any, must be made to bend (not violated) before justice, for the ends of justice so as to put an end to injustice.

(M.R. CALLA, J.)

FINAL ORDER:-

In view of what has been stated hereinabove, question No.1 is answered as per paragraph 11, questions No.2 and 3 are answered as per paragraph 28, and question No.4 is answered as per paragraph 33.

Both the petitions stand disposed of accordingly.

(B.C. PATEL, J.)

(R.K. ABICHANDANI, J.)

csm./ (M.R. CALLA, J.)